IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston Division

KAYLA & MATT COLEGROVE,

Plaintiffs,

v. **Case No.** 2:17-cv-02053

RECEIVABLES PERFORMANCE MANAGEMENT,

Defendant.

NOTICE OF REMOVAL

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, CHARLESTON DIVISION:

Pursuant to 28 U.S.C. §§ 1331, 1332, 1441, and 1446, Receivables Performance Management ("RPM"), by counsel, hereby removes this action from the Circuit Court of Mingo County, West Virginia, to the United States District Court for the Southern District of West Virginia, Charleston Division. Removal is proper because this Court has subject matter jurisdiction over this action under federal question jurisdiction pursuant to 28 U.S.C. § 1331, as well as supplemental jurisdiction over any state law claims pursuant to 28 U.S.C. §§ 1367(a) and 1441(c). Removal is also proper because this Court has subject matter jurisdiction over the action under diversity jurisdiction. 28 U.S.C. § 1332. Accordingly, RPM removes this action to this Court, and in support of its Notice of Removal states the following:

I. BACKGROUND

1. On or about February 16, 2017, Plaintiffs Kayla and Matt Colegrove ("Plaintiffs") filed a Complaint against RPM in the Circuit Court of Mingo County, West Virginia, Case No. 17-C-27 (the "Complaint").

2. The Complaint involves federal and state law claims stemming from Plaintiffs' Dish Network debt serviced by RPM. Copies of the State Court docket report, Complaint, Summons issued to RPM, Discovery, Notice of Deposition, and Joint Stipulation are collectively attached hereto as **Exhibit A**.

3. RPM was served with the Complaint on or about February 27, 2017 by the West Virginia Secretary of State.

4. This Notice of Removal is being filed within one year of the date of the commencement of the action for removal purposes. Accordingly, the action is timely removed pursuant to 28 U.S.C. § 1446(c)(1).

5. This Notice of Removal is being filed within thirty days of service of the Complaint on Defendant. This Notice of Removal is therefore timely under 28 U.S.C. § 1446(b).

6. In their Complaint, Plaintiffs assert various claims related to alleged wrongful conduct with respect RPM's servicing her debt, including alleged violations of the West Virginia Consumer Credit and Protection Act, Article 2 §§46A-2-125, 46A-2-127, 46A-2-127, *et seq.* ("WVCCPA"), and assert claims for unreasonable or oppressive or abusive conduct in an attempt to collect a debt.

7. Additionally, Plaintiffs allege violations of the West Virginia Computer Crimes and Abuse Act ("WVCCAA"), W. Va. Code § 61-3C-14a(a)(2), *et seq.*, and asserts claims for using an electronic communication device with the intent to harass.

8. Based on these allegations, Plaintiffs seek statutory, compensatory, and punitive damages.

9. RPM denies the allegations in the Complaint, denies that Plaintiffs have stated any claim for which relief may be granted, and denies that Plaintiffs have been damaged in any

manner. Nevertheless, assuming for jurisdictional purposes only that Plaintiffs' claims are valid, Plaintiffs could have originally filed the Complaint in this Court under federal question jurisdiction because resolution of Plaintiffs' claims will require determination of significant, disputed issues under federal law. Further, this Court has supplemental jurisdiction over Plaintiffs' state law claims, as they are so related to the federal claims that they form part of the same case or controversy.

10. Moreover, Plaintiffs could have originally filed the Complaint in this Court under diversity jurisdiction because the parties are completely diverse and the amount in controversy exceeds $75,000.

11. Therefore, removal of this entire case is therefore proper under 28 U.S.C. §§ 1331, 1332, 1367(a), 1441 and 1446.

II. FEDERAL JURISDICTION

A. Federal Question Jurisdiction Exists Over Plaintiffs' Claims

12. In Count I of the Complaint, Plaintiffs allege that RPM violated the WVCCPA when it allegedly "engaging in unreasonable or oppressive or abusive conduct towards the Plaintiffs in connection with the attempt to collect a debt by placing telephone calls to the Plaintiffs after the Plaintiffs have requested the Defendant to stop calling the Plaintiffs in violation of West Va. Code § 46A-2-125, *et seq*." (Compl. ¶ 13).

13. In Count I of the Complaint, Plaintiffs allege that RPM violated the WVCCPA when it allegedly "using unfair or unconscionable means to collect a debt from Plaintiffs in violation of West Va. Code § 46A-2-128, *et seq*." (Compl. ¶ 13).

14. In Count I of the Complaint, Plaintiffs allege that RPM violated the WVCCPA when it allegedly "failing to clearly disclose the name of the business entity making a demand

for money upon Plaintiffs' indebtedness in violation of West Va. Code § 46A-2-127, *et seq*." (Compl. ¶ 13).

15. In Count II of the Complaint, Plaintiffs allege that RPM violated the WVCCPA when it allegedly "with the intent to harass, used an 'electronic communication device' as defined by West Virginia Code § 61-3C-14a to make contact with the Plaintiffs after being requested by Plaintiffs to desist from contacting the Plaintiffs in violation of West Va. Code § 61-3C-14a, *et seq*." (Compl. ¶ 18).

16. In Count III of the Complaint, Plaintiffs allege that RPM violated the WVCCPA when it allegedly "made or caused to be made telephone calls to the Plaintiffs causing Plaintiffs' telephone(s) to ring repeatedly and continuously with the intent to annoy and harass the Plaintiffs in violation of West Va. Code § 61-8-16, *et seq*." (Compl. ¶ 24).

17. In Count IV of the Complaint, Plaintiffs allege that RPM violated the WVCCPA when it allegedly "negligently failed to train, supervise, monitor, or otherwise control its employees to ensure that its employees did not violate the state law alleged in Count I." (Compl. ¶ 29).

18. In Count V of the Complaint, Plaintiffs allege that RPM violated the WVCCPA when it allegedly "conduct of Defendant was atrocious, intolerable and extreme so as to exceed the bounds of decency in violation of West Va. Code §§ 46A-5-103(4) and 61-8-16, *et seq*." (Compl. ¶ 33).

19. Federal question jurisdiction pursuant to 28 U.S.C. § 1331 exists over this action because the claims asserted by Plaintiffs in the Complaint involve questions that will require resolution of significant, disputed issues arising under federal law.

20. Further, resolution of Plaintiffs' state law claims will involve determination of issues dependent upon and intertwined with their WVCCPA claims. It is well established that federal jurisdiction exists even when the complaint only purports to assert state law claims if the resolution of those claims depends on significant questions of federal law. *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 303, 312 (2005). Indeed, in determining whether issues arise under federal law, the Court considers the substance of the underlying allegation, rather than its label or form. *Kidd v. TA Operating, LLC*, No. 3:10-cv-69, 2010 U.S. Dist. LEXIS 25659 *4-5 (E.D. Va. March 18, 2010) (holding that federal jurisdiction is proper where the allegations, in substance, assert claims arising under the Constitution, laws, or treaties of the United States, despite plaintiff's argument that he brings only state law claims, finding that "the Court must independently analyze the jurisdictional underpinnings by reviewing the allegations of the Complaint"); *Cuyahoga River Power Co. v. N. Ohio Traction & Light Co.*, 252 U.S. 388, 397 (1920) (concluding that "federal question [exists] not in mere form but in substance, and not in mere assertion, but in essence and effect").

21. Removal is thus proper pursuant to 28 U.S.C. § 1441(a) because the controversy between Plaintiffs and Defendant involves significant issues of federal law over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1331.

B. All Remaining Claims Are Within the Court's Supplemental Jurisdiction

22. Because the Court has jurisdiction, by virtue of federal question, over the claims discussed above, this Court has supplemental jurisdiction over all remaining claims. *See* 28 U.S.C. § 1367. Plaintiffs' state law claims are so related to Plaintiffs' federal claims which are within the original jurisdiction of this Court that they form part of the same case or controversy

under Article III of the United States Constitution. Accordingly, the Court has supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367(a).

C. Diversity Jurisdiction Also Exists Over Plaintiffs' Claims

23. Plaintiffs' Complaint also gives rise to diversity jurisdiction, because the citizenship of Plaintiffs and RPM is completely diverse and the amount in controversy exceeds $75,000.

Diversity of Citizenship

24. Upon information and belief, Plaintiffs are citizens of West Virginia. (Compl. ¶ 1).

25. Defendant RPM is a corporation organized under the laws of Washington, with its principal place of business of 20816 44th Avenue West, Lynnwood, Washington 98036. "[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. § 1332(c)(1). Accordingly, RPM is not a citizen of the state of West Virginia for diversity jurisdiction purposes. *See* Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010).

26. Accordingly, there is complete diversity between RPM and Plaintiffs.

Amount in Controversy

27. Diversity jurisdiction requires an amount in controversy of greater than $75,000 exclusive of interest and costs. *See* 28 U.S.C. § 1332(a).

28. "'[T]he test for determining the amount in controversy in a diversity proceeding is 'the pecuniary result to either party which [a] judgment would produce.'" *Rehbein v. CitiMortgage, Inc.*, 937 F. Supp. 2d 753, 758 (E.D. Va. 2013) (quoting *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002)). In evaluating whether the amount in controversy has been

satisfied, the court may consider: "the type and extent of the plaintiff's injuries and the possible damages recoverable therefore, including punitive damages if appropriate [and] the possible damages recoverable may be shown by the amounts awarded in other similar cases." *Watterson v. GMRI, Inc.*, 14 F. Supp. 2d 844, 850 (S.D. W. Va. 1997).

29. Here, Plaintiffs seek damages in excess of the minimum amount in controversy of $75,000.

30. Plaintiffs' unconscionable inducement claim (Count I) seeks to void the debt with RPM in its entirety, and Plaintiffs allege 39 calls were improperly placed in the Complaint. (Compl. ¶ 10). However, upon review of Plaintiffs' call log produced in support of their claims, Plaintiffs allege approximately 103 calls were improperly placed. (*See* Motion to Seal to be filed). Plaintiffs' log of RPM's allegedly offending telephone calls constitutes "other paper" providing the basis for the amount in controversy here. *See* 28 U.S.C. § 1446(b).

31. "[C]ourts take a rather expansive view of the term 'other paper' used in § 1446(b)." *Bowyer v. Countrywide Home Loans Servicing LP*, No. 5:09-cv-00402, 2009 U.S. Dist. LEXIS 74474 at *11 (S.D. W. Va. Aug. 21, 2009) ("By employing such broad wording, it is evident that Congress intended that nearly any written document generated in the course of litigation and received by the defendant can supply grounds for removal.").

32. In West Virginia, "Examples of … documents recognized by courts as 'other paper' under § 1446(b) include 'requests for admissions, deposition testimony, settlement offers, answers to interrogatories, briefs, and product identification documents given in discovery.'" *Adkins v. Wells Fargo Bank, N.A.*, No. 5:09-cv-01333, 2010 U.S. Dist. LEXIS 43252 at *14, 23 (S.D. W. Va. May 3, 2010) (holding defendant's removal is timely when filed within thirty days of being served with plaintiff's interrogatory responses, rendering the case removable) (*quoting*

Bowyer v. Countrywide Home Loans Servicing LP, No. 5:09-cv-00402, 2009 U.S. Dist. LEXIS 74474 (S.D. W. Va. Aug. 21, 2009) (denying plaintiff's motion to remand, finding defendant's removal timely after receipt of "other paper," reflecting grounds for removal); *see Roberts v. Anchor Packing Co.*, No. 2:05-cv-00320, 2005 U.S. Dist. LEXIS 46433 at *3 (S.D. W. Va. May 19, 2005) (holding "other paper" includes responses to requests for admission); *Hibbs v. Consol. Coal Co.*, 842 F. Supp. 215, 216 (N.D. W. Va. 1994) (recognizing "discovery documents may be 'other papers' within the meaning of 28 U.S.C. § 1446(b)").

33. This Court has held that a call log constitutes "other paper" for purposes of 28 U.S.C. § 1446(b): "As a written document generated by Plaintiff through the course of discovery and received by Defendant, the disclosure of the call log is 'other paper' sufficient to trigger the right of removal under § 1446(b)." *Bowyer v. Countrywide Home Loans Servicing LP*, No. 5:09-cv-00402, 2009 U.S. Dist. LEXIS 74474 at *12 (S.D. W. Va. Aug. 21, 2009). "[T]he term 'other paper' is broad enough to include most written information received by the defendant, 'whether communicated in a formal or informal manner.'" *Dijkstra v. Carenbauer*, No. 5:11-cv-152, 2012 U.S. Dist. LEXIS 60556 at *11 (N.D. W. Va. May 1, 2012) (*quoting Yarnevic v. Brink's, Inc.,* 102 F. 3d 753, 755 (4th Cir. 1996); *citing Lovern v. Gen. Motors, Corp.*, 121 F. 3d 160, 163 (4th Cir. 1997)).

34. Pursuant to 28 U.S.C. § 1446(b), notice of removal may be filed "within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

35. Accordingly, if a defendant discovers that the case is removable (*i.e.*, that the amount of relief plaintiffs seek exceeds the $75,000.00 jurisdictional prerequisite) after receipt of

the plaintiffs' call logs, then it may timely remove the case to federal court within thirty days of receiving such documents.

36. As part of the informal discovery process and in a good faith effort to engage in settlement discussions, the parties exchanged documents associated with this case. On March 22, 2017, Plaintiffs' produced their call log to Defendant. This was the first time Defendant learned how many calls Plaintiffs were alleging that Defendant made to them and, specifically, that the claimed amount of calls would cause the amount in controversy to exceed the jurisdictional amount.[1] Accordingly, this will be filed under seal and attached hereto as **Exhibit C** (*See* Motion to Seal to be filed).

37. Plaintiffs allege various violations of the WVCCPA with potential statutory penalties up to $1,000.00 per violation. *See* W. Va. Code § 46A-5-101. Plaintiffs' Complaint and call log in support demonstrates that Plaintiffs have alleged conduct that would amount to at least one hundred and three (103) violations of the WVCCPA. At $1,000 per violation, together these violations amount to $103,000.00.

38. Plaintiffs also request forgiveness of the debt, punitive damages, and attorneys' fees pursuant to W. Va. Code § 46A-5-104. The Fourth Circuit has held that when a state statute (like the WVCCPA) provides for the recovery of attorneys' fees, they may be included in calculating the amount-in-controversy. Thus, the Court may consider whether an award of attorneys' fees under the WVCCPA could make up a portion of the amount-in-controversy.

39. Based on Plaintiffs' produced call logs, Plaintiffs are seeking damages in excess of $75,000.00. Although Defendant denies that Plaintiffs are entitled to any damages, there is no

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[1] Defendant is required to remove within thirty days of receipt of the call log from Plaintiffs. *See Byers v. Embrace Home Loans, et al.*, No. 5:16-CV-63 (N.D. W. Va. Jun 9, 2016) (remanding case because of Defendants' failure to remove within thirty days of receipt of a call log that gave rise to the amount of controversy). Here, thirty days from receipt would be April 21, 2017, and therefore removal is timely.

doubt that, for removal purposes, Plaintiffs are expressly seeking damages in excess of the jurisdictional minimum. Accordingly, this case qualifies for federal diversity jurisdiction and is properly removable.

III. VENUE

40. Venue is proper in this Court because this district and division encompass the Circuit Court for Mingo County, West Virginia, the forum from which this case has been removed.

IV. NOTICE

41. Concurrent with the filing of this Notice of Removal, RPM will file a Notice of Filing Notice of Removal with the Clerk of the Circuit Court of Mingo County, West Virginia and will attach a copy of this Notice of Removal thereto. A copy of the Notice of Filing of Notice of Removal, excluding exhibits, is attached hereto as **Exhibit B**.

V. CONCLUSION

WHEREFORE, Defendant Receivables Performance Management hereby removes this action to this Court and seeks all other relief as this Court deems equitable and just.

Dated: March 28, 2017

Respectfully submitted,

RECEIVABLES PERFORMANCE MANAGEMENT

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Charleston Division

KAYLA & MATT COLEGROVE,

Plaintiffs,

v. **Case No.** 2:17-cv-02053

RECEIVABLES PERFORMANCE MANAGEMENT,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2017, I electronically filed the foregoing *Notice of Removal* with the Clerk of the Court using the CM/ECF system, and a copy was sent via Federal Express to the following:

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